



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File Nos. PR-2009-001 to  
PR-2009-004

NETGEAR, Inc.

*Decision made  
Wednesday, April 16, 2009*

*Decision and reasons issued  
Tuesday, May 5, 2009*

IN THE MATTER OF complaints filed under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47

**BY**

**NETGEAR, INC.**

**AGAINST**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES**

**DECISION**

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaints.

Diane Vincent  
Diane Vincent  
Presiding Member

Hélène Nadeau  
Hélène Nadeau  
Secretary

## STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> a potential supplier may file a complaint with the Canadian International Trade Tribunal (the Tribunal) concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Moreover, subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

2. On April 16, 2009, NETGEAR, Inc. (Netgear) filed four complaints with the Tribunal under subsection 30.11(1) of the *CITT Act* concerning Requests for Volume Discounts (RVDs) for Solicitation Nos. EN869-071124/O (RVD302), EN869-060292/X (RVD316), EN869-060297/N (RVD318) and EN869-060297/V (RVD325), issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Treasury Board (RVD 302), the Department of National Defence (DND) (RVD316), the Canadian Food Inspection Agency (RVD 318) and PWGSC (RVD325), pursuant to Networking Equipment Support Services (NESS) Departmental Individual Standing Offer (DISO) No. EN578-030742/000/EW.

3. The same RVDs had been the subject of complaints before the Tribunal, filed on June 25, 2008, with regard to RVD302, and on December 10, 2008, with regard to RVD316, RVD318 and RVD325.

4. Netgear indicated that the current complaints are based on new information concerning the above-mentioned RVDs, which was obtained from PWGSC on March 23, 2009, through access to information requests and constitutes new evidence “which either confirms the validity of previous grounds of complaint or raises new grounds of complaint.”<sup>3</sup>

5. In these current complaints, Netgear maintains that PWGSC improperly limited the procurement to particular suppliers of brand-name products and carried out tendering procedures in a discriminatory, non-transparent manner that discriminated against Netgear, in contravention of several provisions of the applicable trade agreements, which, according to Netgear, were the *Agreement on Internal Trade*,<sup>4</sup> the *North American Free Trade Agreement*<sup>5</sup> and the *Agreement on Government Procurement*.<sup>6</sup> Netgear added that PWGSC prejudicially failed to disclose end-user technical justification explanations and operational requirements. Netgear specified that, in prior complaints, it had alleged that “PWGSC improperly limited the procurement to products of particular suppliers, and applied tendering procedures in a discriminatory manner by unjustifiably specifying products by brand name and refusing to provide additional information which was required by NETGEAR (and other bidders) to adequately respond to the RVDs.”<sup>7</sup> Netgear claimed that the new information confirmed that, contrary to what PWGSC had maintained in previous complaint proceedings, there are sufficiently precise ways to describe the procurements requirements other than by merely specifying a particular brand-name product.

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

2. S.O.R./93-602 [*Regulations*].

3. Complaint at 1.

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)>.

5. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994).

6. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)>.

7. Complaint at 6.

6. Netgear's other grounds of complaint are allegations that PWGSC:
- failed to transmit queries asked during the solicitation periods to the applicable client department technical authorities; and
  - failed to notify Netgear, in accordance with the terms of the NESS DISO, of information relating to the award of contracts related to the above RVDs.<sup>8</sup>
7. Regarding the first ground of the current complaints, as stated in paragraph 5 above, the Tribunal concludes that it is essentially the same ground of complaint that was alleged in the original complaints relating to RVD302, RVD316, RVD318 and RVD325. In the original and current complaints with regard to RVD302, RVD316, RVD318 and RVD325, Netgear alleged that PWGSC improperly limited the procurement to particular suppliers and applied tendering procedures in a discriminatory manner by unjustifiably specifying products by brand name and unfairly and prejudicially failing to disclose end-user technical justification explanations and operational requirements.
8. Netgear asserts that the new information constitutes "new evidence" with regard to that ground of complaint and further asserts that the new evidence supports new grounds of complaint relating to the above RVDs. With regard to all four RVDs, and concerning Netgear's assertion that its new evidence is relevant to new grounds of complaint in relation to PWGSC's use of brand names, the Tribunal was unable to find anything that relates to new grounds of complaint in Netgear's current complaints.
9. With regard to the previous complaint relating to RVD302, the Tribunal determined that the complaint had been filed outside of the time limit specified in subsection 6(2) of the *Regulations*<sup>9</sup> and, therefore, did not proceed with an inquiry. In other words, the Tribunal did not consider the substantive merits of Netgear's allegation, having concluded that the complaint could not proceed based on the procedural merits of the statutory bar for lateness.
10. With regard to the original complaints relating to RVD316, RVD318 and RVD325, the Tribunal indicated that the grounds of complaint "ha[d] been previously addressed by the Tribunal and, as such, constitute[d] a matter already decided."<sup>10</sup> As such, the Tribunal considered that addressing the ground of complaint in previous decisions was sufficient since, even though the RVDs were different, the relevant circumstances were highly similar.<sup>11</sup> In doing so, the Tribunal did not make any specific pronouncements regarding the timeliness of the three complaints.

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8. Complaint at 14.

9. Subsection 6(2) of the *Regulations* stipulates that, if an objection has been made to the contracting authority by a potential supplier, a subsequent complaint must be filed "within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier."

10. *Re Complaint filed by NETGEAR, Inc.* (12 December 2008), PR-2008-038 to PR-2008-043 (CITT) at para. 6.

11. In File Nos. PR-2008-038 to PR-2008-043, the Tribunal stated the following:

6. The first two grounds of complaint, which relate to PWGSC's manner of describing the requirements and its alleged lying about the manner in which it claims that it was required to describe the requirement, have been previously addressed by the Tribunal and, as such, constitute a matter already decided.

7. In the previous decisions, the Tribunal considered that Netgear had not established that PWGSC failed to provide suppliers with all the information necessary to submit responsive tenders and was not convinced that PWGSC was required to provide additional information on the client departments' existing equipment and network environments in order to allow suppliers to submit compliant equivalent bids. The Tribunal considered that, by providing a brand name, as well as model and serial numbers, companies involved in supplying network equipment should be able to make determinations as to which of their products, if any, would be fully compatible with, interchangeable with and seamlessly interoperable with the items specified in the RVDs. The Tribunal can find no new set of facts that would justify a re-examination of those grounds of complaint.

11. Since the RVDs or tendering processes giving rise to the original and current complaints are the same, since the allegation being made in relation to those RVDs or tendering processes, that is, the first ground of complaint, is the same, and since the relevant parties, that is, Netgear and PWGSC, are the same, Netgear's current allegation with regard to the first ground of complaint constitutes an attempt to re-litigate the same complaint.

12. With regard to RVD302, the Tribunal must indicate that the statutory bar on a ground of complaint for lateness, which applied to the original complaint, cannot be cured through the introduction of new evidence, no matter how compelling that evidence may be.

13. Also, a re-litigation of the first ground of complaint by Netgear is subject to the doctrine of *res judicata*, only on the procedural issue of lateness. Pursuant to that doctrine, where a final judicial decision has been pronounced, a party is estopped from disputing the merits of the decision in a re-litigation before the same court.<sup>12</sup> Thus, although the first ground of complaint has not, for the specific facts relating to RVD302, been examined on substantive merits, that ground of complaint has been examined on procedural merits relating to lateness. The Tribunal cannot allow its prior decision on lateness to be the subject of a collateral attack attempted through the introduction of new evidence relating to substantive merits.

14. The Tribunal is aware that a narrow exception to the doctrine of *res judicata* is the discovery of new evidence that could not, by reasonable diligence, have been produced in the first litigation. However, that exception is not applicable here because Netgear's new evidence, apart from any consideration of whether it could, by reasonable diligence, have been produced in the original complaint, relates to the substantive merits of the first ground of complaint, not to the procedural merits upon which the doctrine of *res judicata* rests in this instance.

15. Further, concerning section 6 of the *Regulations*, which outlines the time period in which a complaint must be filed after the discovery of a basis for that complaint, the Tribunal cannot accept that the discovery of new evidence by Netgear constitutes a new basis for its first ground of complaint, such that the Tribunal ought to re-set the clock. If the Tribunal accepted such a line of reasoning, it would be faced with the possibility of multiple collateral attacks on completed complaint proceedings. The basis for Netgear's first ground of complaint was the formal notice of denial of relief received on June 10, 2008, as outlined in File No. PR-2008-019.<sup>13</sup> As such, Netgear's assertion that its new complaint proceeding is timely because it was filed within 10 working days of March 23, 2009,<sup>14</sup> merely confuses the statutory issue of timeliness, which relates to the time of knowledge of the basis of a complaint rather than the time of receipt of evidence.

16. With regard to RVD316, RVD318 and RVD325, the Tribunal notes the following in reviewing the documentation provided with the current complaints:

- questions were posed during the solicitation process, requesting, among other things, that PWGSC provide the technical requirements, specifications, product configurations and justification for these requirements, instead of merely providing a brand name and product code;
- PWGSC responded negatively to the requests for additional information; and
- Netgear filed a complaint.

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12. *Wavel Venture Corp. v. Constantini*, [1997] 4 W.W.R. 194.

13. *Complaint filed by NETGEAR, Inc.* (2 July 2008), PR-2008-019 (CITT) at 2.

14. *Complaint* at 15.

17. The Tribunal notes that the date of PWGSC's response represents the point in time when Netgear came into possession of an "actual or constructive knowledge of the denial of relief" relating to its ground of complaint.

18. In other words, the date on which PWGSC responded to the questions is the date on which the statutory requirement of "10 working days" contemplated by subsection 6(2) of the *Regulations* began. In order not to be halted by the statutory bar for lateness, Netgear would have had to file its ground of complaint within 10 working days of receiving PWGSC's responses.

19. According to the documentation provided with the current complaints, Netgear received PWGSC's responses to the questions relating to technical requirements on August 28, 2008 (RVD316<sup>15</sup> and RVD318<sup>16</sup>) and September 5, 2008 (RVD325<sup>17</sup>). In its determination in File Nos. PR-2008-038 to PR-2008-043, the Tribunal stated that Netgear's complaint was originally received on November 27, 2008, and was only considered filed on December 10, 2008, after Netgear responded to a question posed by the Tribunal for the purposes of clarification.<sup>18</sup> This indicates that the first ground of complaint in the original complaints were filed well outside of the 10-working-day time frame specified in subsection 6(2) of the *Regulations*, which would have been September 12, 2008, for RVD316 and RVD318, and September 19, 2008, for RVD325.

20. Thus, while the Tribunal did not address the issue of the timeliness of the complaint in the original complaint proceedings, the Tribunal can conclude from the evidence on the record that, with regard to RVD316, RVD318 and RVD325, the first ground of complaint in the current complaint proceedings is statutorily barred for lateness. Thus, as concerns the first ground of complaint, all the elements of the Tribunal's determination as earlier outlined with regard to RVD302 are applicable to RVD316, RVD318 and RVD325 and are to be considered so applied. Further, since due to the lateness of Netgear's filing, the new evidence presented by Netgear cannot be the subject of an inquiry related to these three RVDs, the Tribunal remains of the opinion that the ground of complaint relates to a matter already decided by the Tribunal.

21. Regarding the second ground of complaint, that PWGSC did not transmit queries to the applicable client department technical authority, the Tribunal can find nothing in either the NESS DISO or the trade agreements that dictates the manner in which such questions must be handled. In the Tribunal's opinion, how a government institution obtains answers to questions posed during a procurement process is an internal matter which is completely within the discretion of that government institution. As such, the Tribunal finds that the second ground of complaint does not disclose a reasonable indication that the procurement has not been carried out in accordance with the applicable trade agreements.

22. Regarding the third ground of complaint, that, contrary to paragraph 14 of the DISO, PWGSC did not notify Netgear of the award of contracts, the Tribunal notes that paragraph 14 reads as follows:

...

**Notification of RVD Results:** All Offerors who respond to an RVD will be notified in writing regarding the outcome of the RVD process. This notice will include the following information:

(A) RVD Number (e.g., RVD # 12345-012345);

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15. Complaint, attachment 9 at 2-5.

16. Complaint, attachment 3 at 12-15.

17. Complaint, attachment 4 at 34.

18. *Re Complaint filed by NETGEAR, Inc.* (12 December 2008), PR-2008-038 to PR-2008-043 (CITT) at para. 3.

- (B) Offeror selected for Call-up (e.g., XYZ Inc.);
- (C) Value of Call-up (e.g., \$000,000.00, GST/HST Included);
- (D) Number of RVD responses received by PWGSC (e.g., 5); and
- (E) Evaluated RVD Price of the Offeror to whom the notification is being sent and the Evaluated RVD Price of the Offeror selected for Call-up.

Unless required to do so by a court or other body of competent jurisdiction, Canada will not disclose the unit prices quoted by an Offeror in response to an RVD. Nor will Canada identify in the notification of RVD results the specific quantities of items subject to the Call-up.

...

23. Regarding RVD302, as Netgear did not submit a proposal, the Tribunal finds that it does not meet the requirement of being an offeror who responded to an RVD and that, therefore, PWGSC has no obligation under paragraph 14 of the DISO to provide Netgear with the notice and listed information.

24. Regarding RVD316, RVD318 and RVD325, for which Netgear did submit proposals, an argument can be made that, pursuant to an indication made in Netgear's complaints, it received the information from PWGSC through access to information requests. In any event, the Tribunal notes that paragraph 14 of the DISO does not contain any specific time limit for providing the notice and listed information. The Tribunal therefore finds no indication that PWGSC has contravened the specification contained in paragraph 14. As such, the Tribunal finds that the third ground of complaint does not disclose a reasonable indication that the procurement has not been carried out in accordance with the applicable trade agreements.

25. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaints and considers the matter closed, as the first ground of complaint was time-barred from being re-examined by the Tribunal and the second and third grounds did not disclose a reasonable indication that the procurement has not been carried out in accordance with the applicable trade agreements.

## DECISION

26. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaints.

Diane Vincent  
Diane Vincent  
Presiding Member